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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 528

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH [1]

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the District Court (R. 8–13) are not reported. The opinion of the Circuit Court of Appeals (R. 124–133) is reported at 150 F. 2d 613.

[1] Together with No. 529, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *John Burns, et al.*; No. 530, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Fred Lollis, et al.*; No. 531, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Arnold E. Bradshaw, et al.*; No. 532, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Philip G. Rust, et al.*; and No. 533, *United States of America, ex rel. Tennessee Valley Authority, Petitioner* v. *Abraham Cole Hyatt, et al.*

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 133, 135, 136–137, 138, 140, 141–142). The petition for writs of certiorari was filed on October 19, 1945, and was granted on December 10, 1945 (R. 144). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to carry out the provisions and purposes of the Tennessee Valley Authority Act.

STATUTE INVOLVED

The provisions of the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended (16 U. S. C. 831–831dd) appear in the record (pp. 65–95).

STATEMENT

The United States of America, on behalf of the Tennessee Valley Authority, filed in the United States District Court for the Western District of North Carolina six separate petitions

to condemn the lands of respondents. The answers of respondents denied the right of petitioner to take the lands, and the cases were tried on the sole issue of whether petitioner has the legal power to take them. By agreement of the parties, the *Welch* and *Burns* cases were tried together (R. 8). The *Rust, Bradshaw, Lollis,* and *Hyatt* cases were likewise consolidated for purposes of trial and were tried together on the record in the *Welch* and *Burns* cases and some additional proof (R. 10, 25–28).

None of the basic facts are in dispute. Under the powers conferred upon it by the Tennessee Valley Authority Act of 1933, as amended, the Tennessee Valley Authority has constructed Fontana Dam and Reservoir on the Little Tennessee River in western North Carolina (R. 14). Lying between this reservoir and the Great Smoky Mountains National Park is a mountainous area of approximately 44,000 acres, originally scheduled for inclusion in the park (R. 39) and inhabited prior to the construction of the dam by 216 families (R. 56). It was served by North Carolina State Highway No. 288, a road approximately 50 miles in length running through extremely rugged country from Deals Gap to Bryson City (R. 15, 38; Pet. Ex. 3, R. 30, 146; Pet. Ex. 4, R. 37, 147). The reservoir flooded this highway throughout most of its length and has rendered the area served by it inaccessible except by water and by foot trails (R. 15).

Fontana Dam is a massive structure ranking fourth in height and volume of concrete among water control structures in the world. Built at a cost of more than $65,000,000, it is 480 feet high and contains more than 2,800,000 cubic yards of concrete. The reservoir created by the dam is 29 miles long and contains 1,100,000 acre-feet of useful storage. The project is operated as a part of the Authority's navigation, flood control, and hydroelectric system. The storage capacity is utilized for the prevention of floods, not alone on the Tennessee River but also on the lower Ohio and Mississippi Rivers. Since the project is located on a headwater tributary of the Tennessee River, the stored water is successively utilized for power purposes not only at its own powerhouse but also at ten dams which lie below it on the Little Tennessee and Tennessee Rivers. *Annual Report of the Tennessee Valley Authority for the Fiscal Year Ending June 30, 1945,* filed pursuant to § 9 (a) of the Act, pp. 35, 39, 234. The project will have an installed generating capacity of 200,000 kilowatts and adds 165,000 kilowatts of continuous power to the Authority's system. H. Rep. 1470, 77th Cong., 1st sess., p. 25. Although the dam was a part of the Authority's long-range multipurpose program, the immediate occasion for its authorization in 1942 was to meet urgent power requirements for war production in the Tennessee Valley area. H. Rep. 1470, 77th Cong., 1st sess., p. 25.

State Highway No. 288 was owned and maintained by North Carolina but had originally been financed by bond issues upon which Swain County, North Carolina, was obligated (R. 15). It was a gravel road, narrow, tortuous, and dangerous, and far below modern standards of highway construction (R. 21, 23). It carried practically no through traffic (R. 59), and the State Highway Commission felt that its original construction had been a waste of money (R. 53). Its flooding, however, created a variety of problems, and the State of North Carolina and Swain County demanded that some action be taken to protect them (R. 15). To replace it with a road of similar quality would have cost approximately $1,400,000 (R. 21, 41), and both the State and petitioner felt that such an expenditure would not be a wise or efficient use of public funds (R. 52–53, 57, 63, 100). It soon appeared also that reconstruction of Highway No. 288 was probably impossible, since the War Production Board informally advised the Authority that the reconstruction of the highway was not sufficiently important to justify the expenditure of materials and manpower required (R. 48, 53, 63, 100).[2] The necessary

[2] The finding of the district court was that "the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised" (R. 15, 22).

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equipment and material could not have been obtained under the circumstances then existing without the active assistance of the War Production Board (R. 22).

Purchase or condemnation of the legal interests of the State and the landowners in the road would have produced serious social and economic problems since the absence of roads would have made it impossible to provide adequate schools, markets, police protection, health services, or fire control within the area formerly served by the highway (R. 58). Largely for this reason the State refused to consider any settlement which would leave these lands in possession of the occupants without adequate roads (R. 42–43, 49–50). The value of the interest of the State, if it had been acquired by condemnation, would presumably have been measured by the $1,400,000 cost of rebuilding the road (see *infra*, p. 39). The acquisition of the easements of access appurtenant to the lands served by the road would have cost substantially as much as the fee (R. 58–61)—about $775,000 (R. 65). This means of dealing with the problem would, therefore, have required an expenditure of over two million dollars, approximately twice that of the solution adopted, while creating an isolated area with its attendant social and economic problems.

The State insisted that all of the area served by the highway be taken out of private ownership

if Highway 288 was not to be reconstructed since it wanted assurance that it would not need to construct new facilities to replace it. It also insisted that any solution adopted be satisfactory to Swain County. (R. 42–43, 48, 57.)

The solution finally determined upon, which was worked out after 1½ years of consideration and negotiation (R. 51) and after securing the approval of the Governor, the Council of State, and the Legislature of the State of North Carolina (R. 48–49), was embodied in a settlement contract between the State, the County, the National Park Service, and the Authority (R. 99–113). The essential provision in the agreement is that, in consideration of the release by the State and County of all claims arising out of the flooding of Highway No. 288, the Authority must acquire all of the land previously served by the highway, with the exception of some mining property, either by voluntary acquisition or by condemnation, so as to relieve the State of the necessity of providing access to these properties (R. 101–103, 110–111).[3] The contract also provides for the transfer of the lands so acquired to the

[3] The contract excepted the lands belonging to the North Carolina Exploration Company (R. 102). Acquisition of the tract owned by the North Carolina Mining Corporation was permitted to be postponed until a date six months after the cessation of hostilities because the parties recognized that the mining of this tract of land might be of importance to the prosecution of the war (R. 102–103).

National Park Service for inclusion within the boundaries of the Great Smoky Mountains National Park (R. 63, 103–105) and for the construction by the Park Service, whenever funds are made available by Congress, of a parkway through the area as contemplated in the master plan evolved by the National Park Service for the development of the Park (R. 64, 105–107). The State agrees to contribute $100,000 to aid in the acquisition of the land (R. 64, 109), and the Authority agrees to pay Swain County $400,000 to be used in retiring a portion of the road bonds (R. 64, 109).

The problem arising out of the flooding of Highway No. 288 was one of the most difficult and complicated readjustment problems encountered during the construction program of the Tennessee Valley Authority (R. 56). It was the subject of extensive study by the Authority's staff, and when the contract of settlement was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff which described the situation above outlined and the reasons for the proposed contract (R. 14, 15–16, 21, 61–65). Upon the basis of the report and recommendations, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

With respect to the fee interest in the lands served by Highway No. 288 and owned by respondents, the Board passed identical resolutions affecting the several tracts, stating that:

> * * * the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933 [R. 61–62].

These determinations were made in good faith (R. 14, 21).

The Authority purchased all the lands which the contract required it to acquire except the tracts owned by the respondents (R. 21, 127–128, 146, 147). Apart from about 1½ acres of land owned by respondent Welch as to which there is no controversy (R. 16), none of the respondents' lands were flooded by the impounding of the waters of Fontana Dam, but the rights of access of all were taken by the flooding of Highway No. 288 (R. 15, 21).

The District Court, after hearing proof, rendered opinions holding that petitioner is without legal power to take any of the lands except the acre and one-half owned by respondent Welch which was actually flooded (R. 8–13); made findings of fact (R. 14–25); and entered judgments dismissing the condemnation petitions and

striking its former orders placing petitioner in possession of the lands (R. 1–7).[4]

Upon stipulation of the parties, the six cases were consolidated for purposes of petitioner's appeal (R. 27–28). The Circuit Court of Appeals affirmed the judgments of the district court.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the petitioner was without legal power to condemn respondents' lands;

2. In holding that the Tennessee Valley Authority Act does not confer upon petitioner the legal power to acquire respondents' lands;

3. In holding, in effect, that the question of the necessity for the taking of lands is a judicial question;

4. In holding that petitioner cannot legally condemn a fee interest in lands when, in the opinion of the court, an easement would be sufficient to meet its requirements;

5. In holding that the court can review a determination made in good faith by the Board of Directors of the Tennessee Valley Authority as

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[4] As to respondent Welch, the order of possession was modified to authorize continued possession only of the small tract actually flooded (R. 2). The judgments in the cases of respondents Welch and Burns ordered the landowners to release their rights to any recompense for the flooding of the highway and the consequent taking of their rights of access (R. 1–2, 3–4). This was done with the consent of these respondents (R. 8, 9).

to the necessity for the acquisition of an interest in land and substitute its determination for that of the Board of Directors;

6. In holding that the lands were taken by petitioner for the purpose of transferring them to the National Park Service, Department of the Interior;

7. In holding that the lands were not taken for a public use; and

8. In holding that the Federal Government may not condemn a fee interest in lands even though an authorized taking by the Government has substantially destroyed the value of the lands and the owners are entitled to compensation for the taking.

SUMMARY OF ARGUMENT

I

The Tennessee Valley Authority Act confers upon the petitioner the full constitutional power of the Federal Government to condemn lands for purposes of the Act. The Act as a whole indicates that Congress intended to confer wide discretionary power upon the Tennessee Valley Authority and confers the power of eminent domain in the broadest terms. Sections 4 (i) and 25 authorize the condemnation of any lands deemed by the Authority to be necessary for carrying out the provisions and purposes of the Act. That Congress contemplated acquisition by the Authority of lands not actually flooded appears from various sections of the Act, particularly Section 4

(k), which authorizes it to dispose of lands for specified purposes, including the operation of pleasure resorts and the erection of docks and buildings for shipping, storage, and manufacturing enterprises. Section 31 provides that the Act shall be liberally construed. Nor is the Authority's power to condemn land less broad than its power to purchase; for it is the policy of Congress, expressed in the general condemnation statute and applicable here, to authorize the condemnation of any lands which there is authority to purchase.

II

The taking here in question is within the Federal Government's power of eminent domain. This Court has held that in the construction of dams and reservoirs the Government is not limited to condemning the lands upon which its projects are to be physically located but can constitutionally condemn whatever lands are reasonably necessary to solve the resulting social and economic, as well as physical, problems. The acquisition of respondents' lands is necessary to resolve by the most effective and desirable means at hand the social and economic problems which result from the construction of the project and, we submit, is more closely connected with the Fontana Reservoir project than was the case in previous instances of condemnation which have

been sustained. The use of the lands here contemplated is a public use incident to the reservoir project.

III

The decision of the Board of Directors of the Tennessee Valley Authority to enter into the contract of settlement requiring the acquisition of respondents' lands was made in good faith and after careful consideration of all relevant information. If power to acquire such lands exists, the court below erred in inquiring into the necessity for the taking, since it is settled by numerous decisions of this Court that the necessity of a taking for a public use is a legislative and not a judicial question.

ARGUMENT

Introductory

By the flooding of Highway No. 288, petitioner incurred two sets of liabilities—liability to the individual landowners for the taking of the easements of access appurtenant to their lands, and liability to the State of North Carolina for the taking of its interest in the highway. The satisfaction of both sets of liabilities could conceivably have been accomplished by the adoption of one of three alternatives: (1) reconstruction of the highway above the level of the reservoir, (2) purchase or condemnation of the landowners' easements and the State's interest in the highway, or (3) purchase

or condemnation of the fee title to the lands served by the highway and a release of the State's interest in the highway.

As the facts already stated demonstrate, the first two alternatives were not feasible. The reconstruction of the highway would have required the use of 500,000 man-hours of labor and a very large amount of material and equipment (R. 21-22, 41) in an area in which the manpower and housing situations were critical during the war, thereby delaying completion of the Fontana project (R. 57) which was urgently required for war purposes;[5] and the War Production Board had informally advised the Authority that it would not grant the necessary priorities (R. 48, 53–54, 63, 100). This solution would have been an undesirable one in any event, involving the expenditure of $1,400,000 for the reconstruction of a road that the State felt would involve a waste of money (R. 52–53). The second alternative would have been even more expensive (see *supra*, p. 6) and would have created intolerable social and economic conditions by leaving unsolved the problems caused by the elimination of the only road serving an inhabited territory.

The adoption of the third alternative and the acquisition of the fee instead of simply the ease-

[5] See Hearings before Subcommittee of House Committee on Appropriations, 77th Cong., 1st sess. on Third Supplemental National Defense Appropriation Bill for 1942, part 1, pp. 565, 575–577.

ments of access appurtenant to the lands served by the highway effected a settlement whereby:

(1) The Tennessee Valley Authority extinguished all of the liabilities incurred by flooding Highway No. 288 for approximately $1,075,000;

(2) The wishes of the State, the County, and the vast majority of the landowners were respected;

(3) The people who lived in the affected area were paid in full for their property and enabled to relocate in communities where the ordinary governmental and economic services are available;

(4) The county, state, and national governments were relieved of the responsibility of law enforcement, public health, and education in an area in which such services could not have been adequately provided; and

(5) Swain County was enabled to pay off most of the bonds which had been issued to pay for the original construction of Highway No. 288.

Additional and incidental benefits derived from the settlement are the completion of the Great Smoky Mountains National Park to its original boundaries without cost to the Park Service and provision for the construction at a future date of a parkway which is an integral part of the master plan of the Park Service for the development of the Park and which will also serve as a through road from Deals Gap to Bryson City.

I

The Tennessee Valley Authority Act confers upon petitioner the full constitutional power of the Federal Government to condemn lands for the purposes of the Act

The Tennessee Valley Authority is a corporation charged by Congress with responsibility for a program of regional development, including the harnessing of the Tennessee River for navigation, flood control, and electric power; the production of munitions; fertilizer manufacture, research and demonstration; soil conservation; reforestation; and research designed to foster the orderly physical, social, and economic development of the Tennessee Valley and adjoining areas (R. 65–95). To enable it to carry out this program, the Tennessee Valley Authority was relieved of many of the restrictions generally applicable to Government agencies and was given a broad discretion in the choice of means suitable for attaining its statutory objectives.* The grant of the power of eminent domain is consistent with this congressional policy of conferring upon the Board of Directors of the Tennessee Valley Authority the discretion necessary to enable it to perform efficiently the duties imposed upon it by the act.

The power of condemnation is granted in sections 4 (i) and 25 of the act in the broadest terms. Section 4 (i) provides that the Corporation—

* See, for example, sections 3 (R. 68), 4 (a)–4 (g) (R. 69), 9 (b) (R. 75–77), and 26 (R. 93–94) of the Tennessee Valley Authority Act.

> Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and *to condemn all property that it deems necessary for carrying out the purposes of this Act* * * * [R. 69; italics supplied].

Section 25 provides that

> The Corporation may cause proceedings to be instituted for the acquisition by condemnation of *any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act.* * * * [R. 91; italics supplied.]

There is nothing in the foregoing sections to indicate that Congress intended to restrict in any way the power granted to the Tennessee Valley Authority to condemn property for the purposes of the Tennessee Valley Authority Act, and, indeed, it is difficult to see how the power of eminent domain could have been conferred in any broader terms. The only requirement is that the Authority find that the acquisition of the prop-

erty is necessary to carry out the purposes of the Tennessee Valley Authority Act. Findings to that effect were made in good faith in these cases by the Authority's Board of Directors (R. 14, 21; Pet. Exs. 1, 2, 2a, 2b, R. 61).

In several sections of the Act Congress has expressly recognized that in the acquisition of reservoir sites the Authority may find it necessary to acquire lands not actually flooded. Thus, section 4 (l) authorizes it to cooperate in the readjustment of the population displaced by "construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land * * *." (R. 71.)[7] Section 4 (k) authorizes the Tennessee Valley Authority to dispose of lands acquired by it for various purposes, including the operation of pleasure resorts for boating, fishing, and bathing, the erection of docks and buildings for shipping purposes, or for

[7] This section was added to the act by amendments in 1935 (49 Stat. 1080). The content of the term "protection of watersheds" can best be explained by reference to the Annual Reports of the Tennessee Valley Authority for the years 1934 (p. 14) and 1935 (p. 8). In the latter report the Authority's Board of Directors pointed out that substantial acreages had been acquired above the maximum pool elevation of the Norris Reservoir, the first project constructed by the Authority, in order to provide a protective strip around the reservoir. Additional lands were also acquired to avoid claims for severance damages or because it was cheaper to acquire the land than to provide access facilities in certain peninsular areas.

manufacture or storage of products to be shipped. Section 31 provides that

> * * * any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4 (k) of this Act [. 95].

The legislative history of Section 31 shows that Congress understood and intended that in the settlement of reservoir problems the Authority would acquire land which would not be incorporated into any project and would not be needed after the reservoir problems had been solved. Added by amendments adopted in 1935 (49 Stat. 1075, 1080), this section of the Act, as reported by the House Committee on Military Affairs (§ 11 of the bill as reported), prohibited the acquisition as well as the retention of any land not "actually necessary to carry out the plans and projects actually decided upon requiring the use of such land" (H. Rep. 1372, 74th Cong., 1st sess., p. 22). But in a supplemental report, Representatives Kvale and Maverick pointed out that "in the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line" (*id.* at 33) and further stated that

> * * * in some sections in the reservoir areas, little peninsulas of land are neces-

> sarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the land in peninsulas than to construct new roads along the steep mountain sides. * * *
> * * * to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project [*ibid.*].

The prohibition against acquisition contained in Section 31, as reported out by the House Committee, was eliminated in the section as finally adopted, and the prohibition against retention of land was modified to its present form, leaving the determination as to the necessity for retention in the discretion of the Board (§ 12 of the bill as adopted; H. Rep. 1846, 74th Cong., 1st sess., pp. 6, 9). In the light of this legislative history, the elimination of the prohibition against acquiring lands "not actually necessary to carry out plans and projects actually decided upon" can only be construed as a recognition and affirmation of the power to take lands related to but not physically a part of the Authority's projects.

To insure that the Authority would not be hampered by narrow construction of the powers vested in it, Congress provided in Section 31 that—

> This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Gov-

> ernment properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare * * * [R. 95].

In Section 4 (g) Congress conferred upon the Authority

> * * * such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation [R. 69].

We think it is clear, then, that Congress, far from limiting the power of condemnation delegated to the Tennessee Valley Authority, has granted to it the full constitutional powers of the Federal Government to take property for all the purposes of the Tennessee Valley Authority Act.

It would be unsound to construe the Act to permit the taking of only such lands as are actually flooded or to be physically occupied by a structure. A similar contention was rejected in *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706. There it was urged that the Secretary of War under the Rivers and Harbors Act of 1888 was authorized to take only flowage easements over land covered by water. Although the statute, which authorized the Secretary of War to condemn "any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improve-

ment of rivers and harbors for which provision has been made by law", was certainly no broader than the Tennessee Valley Authority Act, the court sustained the taking of the fee in lands not flooded (113 F. 2d at 392), stating that "The power thus granted is unlimited and we cannot read into it limitations not clearly indicated by Congress" (113 F. 2d at 391–392). We submit that the same conclusion is applicable here.

In the brief in opposition (pp. 23–28) respondents contend that, even if the Tennessee Valley Authority has the legal power to purchase lands which are rendered inaccessible if, in the opinion of its Board of Directors the acquisition of the lands is more feasible than the replacement of the highways which formerly served them, Congress has not conferred the power to condemn such lands. At p. 25 of the brief it is said:

> It is, of course, elementary that there is a vast distinction between the right or authority, on the one hand, to purchase land and the power, on the other, to condemn it. The right to *purchase* private property from willing sellers is, of course, given by Congress in many instances where a taking against the owner's will would not be authorized by the Act, or condoned by the Courts.

This distinction finds no support in the Acts of Congress or the decisions of this Court. It is the established policy of Congress to confer upon

administrative agencies a power of condemnation co-extensive with their power to purchase. This policy finds expression in the general condemnation Act of August 1, 1888, 25 Stat. 357, as amended, 40 U. S. C. 257, which provides that whenever an officer of the Government "has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation. * * *."

In *Hanson Co.* v. *United States*, 261 U. S. 581, this Court held that "the authority to condemn conferred by the last mentioned act extends to every case in which an officer of the Government is authorized to procure real estate for public uses" (p. 587), and that the powers conferred thereby are in addition to the powers conferred by other statutes. Accord, *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *United States* v. *Threlkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620. The reasons of policy behind the Act are explained in the *Hanson* case as follows:

> It would have been futile to authorize the purchase of an essential part of a great project, withholding power to condemn, and so leave it within the power of the owner to defeat the program by demanding a price in excess of $65,000 or by refusing to sell at all. The argument is without force [p. 586].

In view of the established policy of Congress set forth in the Act of August 1, 1888, as applied by this Court, it seems clear that if Congress had intended to restrict the use of the condemnation power in the acquisition of land which the Tennessee Valley Authority is authorized to purchase, it would have said so in unmistakable terms. In the absence of an express restriction in the Act, there is no basis in policy or authority for confining the condemnation power under the Tennessee Valley Authority Act within narrower limits than those prescribed by the Act of August 1, 1888, especially since the Authority could proceed under the latter Act to condemn any land which it is authorized to purchase.

II

The taking of respondents' lands is a valid exercise of the constitutional power to take land for reservoir purposes

The decision of the court below is based largely upon the view that the constitutional power to condemn lands for reservoir purposes is not sufficiently broad to permit the taking of the lands of respondents. On the theory that respondents' lands are not necessary for the Fontana project, it holds that they are being taken "not for the public use for which the statute gives the right

of condemnation, but for a private use, or at most for a public use [incorporation in a national park] not authorized by statute" (R. 129). The court states that the constitutional power to condemn land for reservoir purposes permits the Federal Government to acquire only lands actually flooded or needed for materials, plus the easements necessary to relocate flooded highways and similar facilities (R. 126, 130, 132). The opinion may be summarized as follows: If the taking of respondents' lands is interpreted as a taking for national park purposes, there is constitutional power but no statutory authority; if the taking is interpreted as a taking for reservoir purposes, there is a complete lack of constitutional power, and the taking is not for a public use. Petitioner, however, has never contended that the Tennessee Valley Authority has statutory power to acquire lands for national park purposes, and the question presented is therefore whether the court below has correctly defined the scope of the Federal Government's constitutional power to condemn land for reservoir purposes.

To limit the constitutional power to take lands for a reservoir project so narrowly as to permit the condemnation only of lands physically part of the project would seriously hamper the construction of projects and gravely limit the accomplishment of programs of internal improvement. The contours of a reservoir rarely conform to

the boundary lines between private owners, and such an interpretation would require the Government in many cases to leave farmers with remainders insufficient to support families, without permitting it to acquire their entire farms so as to enable them to relocate elsewhere. It would also require that families be left on little peninsulas or on islands, without adequate means of access, or that the Government incur disproportionate and extravagant expense in building highways or constructing bridges to reach them.

A large reservoir project may flood many square miles of land, inundating highways and railroads, water and sewage mains, power lines and other utility facilities, courthouses, schools, and even whole towns or villages. The final settlement of the multitude of problems arising out of the flooding of these structures and facilities is as necessary to final completion of the project as the concrete that goes into the dam (cf. R. 37–38, 55–56). There is no single or simple answer to all of these problems. Sometimes cash payments will suffice. More frequently it is necessary to provide substitute facilities or to assist landowners in other ways to adjust to the changed conditions caused by the flooding. The solutions to these problems, which are an integral part of the project, may be the most difficult part of the over-all job. The solution of each problem must be tailor-made and requires the combined efforts of a staff of experts in highway, railroad, sanita-

tion, and other engineering problems, agriculture, community planning, and other fields. In settling these problems, it is essential that those charged by Congress with the administration of a project be given sufficient discretion to permit them to effect wise and economical solutions.

It may be suggested that the Government should ignore the social and economic problems caused by the construction of the reservoirs, the desires and interests of the State, the County, and other agencies of local government, as well as those of the landowners; but we cannot believe that the Constitution requires the Federal Government to follow such an irresponsible course. It could hardly be argued that the Federal Government, having spent millions of dollars on the construction of a project, may not take the steps necessary to heal the physical scars of construction so as to render the approaches and immediate surroundings reasonably attractive, as state authorities are empowered to do.[8] The prevention of the social and economic dislocations which would result from leaving an isolated area in which ordinary governmental services could not be effectively provided would seem to be at least equally important and equally within the power of the constructing agency to deal with.

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[8] See *In re City of New York*, 57 App. Div. 166, 68 N. Y. Supp. 196; *Curran* v. *Guilfoyle*, 38 App. Div. 82, 55 N. Y. Supp. 1018; *University of So. Calif.* v. *Robbins*, 1 Cal. App. 2d 523.

We are not forced to a consideration of hypothetical cases to illustrate the results which would flow from the approval by this Court of the doctrine enunciated by the court below. The case at bar illustrates graphically the evils which would result from denying to the administrators charged with responsibility the flexible powers necessary to solve the resulting problems. The court below concedes that petitioner might either have reconstructed Highway No. 288 or have acquired by purchase or condemnation the interests of the State of North Carolina in the highway and the easements of access appurtenant to the lands of respondents and other lands which the highway served (R. 130, 132). As we have pointed out, however, neither of these alternatives presented a practical solution to the problem. The first was probably impossible in wartime (see *supra*, p. 5), while the other was equally undesirable because it would have left unsolved the very problems with which it was necessary to cope. The provision of adequate schools, markets, health services, police protection, or means of fire control to a small and sparsely inhabited area accessible only by water and by foot trails would obviously have been impossible. It must be assumed that many of the 216 families would have moved out of the area, and it is difficult to see how any of the foregoing services could be provided for those who would remain, scattered as they would be over 65 square miles of mountainous land (Pet. Ex. 3, R. 30–31,

146). It is not surprising, therefore, that the undisputed evidence shows that failure to reconstruct the highway or to acquire the lands served by it in fee "would produce intolerable social and economic problems" (R. 58). Neither is it surprising that the State would not consider any settlement that would permit such a result (R. 42–43, 49–50).

There is no support in the decisions of this Court for the narrow view of the scope of the power of eminent domain adopted by the court below. The power of condemnation possessed by the Federal Government is an essential element of sovereignty, as broad "as is necessary to the enjoyment of the powers conferred upon it by the Constitution" (*Kohl* v. *United States*, 91 U. S. 367, 372). See also *Hanson* v. *United States*, *supra*. The Court has long since held that this power, like the scope permitted to the corresponding powers of the States by the Fourteenth Amendment, is not limited to the acquisition of property which is to be physically occupied by a public improvement but extends to the taking of any lands the acquisition of which bears a reasonable relation to the completion of the project.

In *Brown* v. *United States*, 263 U. S. 78, in a situation closely analogous to the case at bar, it was held that the acquisition by the United States of a town site to replace the portion of a town flooded by an authorized reservoir was a taking for a public use even though as an incident to

the readjustment some of the tracts acquired might be found to be surplus lots and would therefore be sold. The Court rejected a contention "that the power of eminent domain does not extend to the taking of one man's property to sell it to another," holding that "it was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one" because

> * * * the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site [263 U. S. at 81].

In *Dohany* v. *Rogers*, 281 U. S. 362, this Court upheld the condemnation of an interest in land to be used for the relocation of a railroad right-of-way which in turn was being taken by the State of Michigan for use in a highway project, upon the ground that

> It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use [281 U. S. at 366].

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[9] *Accord*, *Weyel* v. *Lower Colorado River Authority*, 121 S. W. 2d 1032 (Tex. Civ. App.); *Town of Cookeville* v. *Farley*, 171 Tenn. 260; *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich. 649; *Harter Bank* v. *Washington Watershed C. Dist.*, 53 Ohio App. 325.

It is thus established that private property which will not be physically incorporated in a public project may be condemned as necessary to the project in order to replace public utilities which are being destroyed.

In the *Brown* case this Court went even further by holding that private property as well as public utilities may be replaced, citing *Pitznogle* v. *Western Maryland R. R. Co.*, 119 Md. 673, which sustained a condemnation to replace a private right-of-way that had been the only means of access of certain landowners to a public highway, 263 U. S. at 83. Upon the theory implicit in the *Pitznogle* decision, the *Brown* case holds that private property may be taken for the purpose of transferring it to other property owners whose holdings are being destroyed by a public improvement.

The foregoing cases are indistinguishable in principle from the case at bar. They hold that land not physically occupied by a project can nevertheless be condemned if its acquisition is necessary to solve the relocation problems created by the construction of the project. If the contemplated uses of the land involved in the *Brown* and *Dohany* cases bring the acquisition of property within the power of eminent domain, we submit that the condemnation of respondents' property falls equally within that power. The court below attempted to distinguish the *Brown* and *Dohany* cases upon the ground that there the

purpose was "to obtain for another the sort of thing that has been taken from him" (R. 132). But constitutional questions relating to the power of the Federal Government should not turn upon such arbitrary distinctions. The taking of the fee interest in respondents' lands has a much closer relationship to the authorized project than did the takings involved in the cited decisions. In the *Brown* and *Dohany* cases, lands which were unaffected by the projects were taken in order to overcome the effects upon other property. Here, respondents' lands themselves are directly affected by the project since they have been rendered largely useless by the concededly authorized taking of the easements of access. The taking of the fee is therefore one step nearer to the reservoir project than would be the taking of the lands of strangers in order to construct roads to provide access to respondents' lands, as the court below concedes that petitioner could properly do (R. 132). The owners of such lands could much more plausibly contend that their property was not being taken for a relevant public use than can the respondents in this case.

In *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706, the landowners contested the right of the United States to take the fee simple title to property only part of which would be flooded, asserting, as do respondents here, that an easement over land actually flooded was sufficient for the Government's

purposes and that the fee was being taken so that the land could be devoted to recreational purposes. They also contended, with what the court apparently considered to be some inconsistency, that their lands would be completely destroyed by the operation of the dam. The court held that the Government could acquire the fee simple title to all the land, including the part not flooded, and that since the original taking was for purposes of navigation and flood control, its validity would not be affected by plans for the subsequent use of the property for recreational purposes. Commenting on defendants' contention that the operation of the dam would completely destroy the lands, it stated:

> If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite [113 F. 2d at 392].[10]

Upon the same theory, it has been determined that "remnant lots" of little or no value, created

[10] It is settled that upon the physical taking of land by the Federal Government, title automatically vests in the United States, the owner thereafter being relegated to a claim for compensation for the taking. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445; *Hurley* v. *Kincaid*, 285 U. S. 95. Since it is undisputed that the flooding of the highway substantially destroyed the value of the lands served by it (R. 58, 61), the decision of this Court in *United States* v. *Lynah* suggests that petitioner, far from being without the constitutional power to acquire the fee in respondents' lands, may have already acquired the fee title by operation of law by taking the easement of access appurtenant to them and thus

by a public improvement, may be condemned along with the land occupied by the improvement. *Armstrong* v. *City of Detroit,* 286 Mich. 277; *Emmons* v. *City of Detroit,* 261 Mich. 455, affirming 255 Mich. 558; *City of Chicago* v. *McCluer,* 339 Ill. 610. In the case at bar, as respondents concede (Br. in Opp. 14), the lands have been rendered practically valueless by the taking

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destroying their value. In the *Lynah* case, this Court stated the rule as follows:

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner" (188 U. S. at 470–471).

The *Lynah* case involved a rice plantation which had become a virtually irreclaimable bog as a result of navigation improvements in the Savannah River. The ruling of the Court that a taking of the fee occurred was based on its conclusion that the damage to the land could not be remedied without disproportionate expense. On this basis, it distinguished *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.), which held that there was no taking under facts which were similar except that the rice plantation could be protected by an expenditure of $10,000. The prohibitive cost of access to the lands in suit brings this case within the rule of the *Lynah* case rather than that of the *Mills* case.

of the appurtenant easements of access, and this fact alone would seem to justify the taking of the fee.[11]

The so-called "excess taking" cases[12] relied on by the court below should be distinguished in the

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[11] The opposition of respondents to the taking of the fee in their properties is not based on any desire to retain their lands in the condition in which they have been left. It is clearly based on the hope that the National Park Service will accept the other lands acquired by petitioner and construct a highway to serve their properties, thus according to them a preferential treatment denied to the other landowners. The respondent Welch, the only respondent who testified, admitted as much on the stand (R. 61). Respondents Rust, Hyatt, Lollis, and Bradshaw frankly took this position in their brief filed in the District Court: "Under its agreement with the State, et al. the Department of the Interior is to reconstruct the road at some future date, perhaps not until the war is over. The landowners in this litigation are perfectly willing to bide their time, cooperate with the public authorities, and await such reasonable time as may be necessary, to relocate and reconstruct said highways". (Br., pp. 26–27.) In their brief in opposition to certiorari, respondents still take the position that the Government should afford them preferential treatment by constructing a road to serve their properties, stating that the cost of a road to serve only the four respondents who have not waived their claim for damages "will be almost negligible" (p. 23). The undisputed testimony shows that the cost of such a road would be approximately $330,000 (R. 36), not $40,000 or $50,000 as the District Court states in its Memorandum Opinion (R. 13), cited by respondents.

[12] *Cincinnati* v. *Vester*, 33 F. 2d 242 (C. C. A. 6), affirmed, 281 U. S. 439; *Warm Springs Irr. Dist.* v. *Pacific Live Stock Co.*, 270 Fed. 560 (C. C. A. 9); *Wilton* v. *St. Johns County*, 98 Fla. 26; *Richmond* v. *Carneal*, 129 Va. 388; *Salisbury Land & Imp. Co.* v. *Commonwealth*, 215 Mass. 371; *Opinion of the Justices*, 204 Mass. 607.

present instance as they were in the *Brown* case, where it was pointed out that the distinction

> * * * is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation [263 U. S. at 84].

The Tennessee Valley Authority is not here seeking to profit from the sale of the lands sought to be acquired or to recoup any part of the cost of the Fontana project.

The court below was apparently misled by the fact that the agreement of settlement contemplates the ultimate transfer of the possession and control of the lands condemned from the Tennessee Valley Authority to the Department of the Interior, stating that petitioner is seeking to condemn the lands "in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park" (R. 126). It looked at the case exactly as though petitioner were condemning lands located in another part of the State and having no possible relation to the Fontana project, in order to secure the incorporation of those lands in the national park in return for a release of the State's claim for damages for the flooding of the highway. It completely overlooked the fact that the lands themselves were directly affected by the reservoir,

that the easements of access appurtenant to them were taken, that the value of the lands was almost completely destroyed by the construction of the reservoir, and that the lands themselves were at least as important a part of the relocation problem faced by petitioner as was the highway.

Petitioner does not contend that it could condemn respondents' lands in order to turn them over to the Park Service. They are not being condemned for that purpose. If the lands had not been adjacent to the park, it would equally have been necessary for petitioner to acquire them so that they could be retired from private ownership. Having acquired the lands, the Tennessee Valley Authority would have no further need for them, and would be compelled to work out some other plan for their disposition.[13] Here, it was possible for the Authority to avoid this problem by turning the lands over to the Department of the Interior. The transfer will result in a benefit to the United States and to the State of North Carolina, since it will enable the

[13] See Presidential Proclamations approving transfer to the Forest Service, Department of Agriculture, of the possession and control of 16,780 acres acquired by the Tennessee Valley Authority in the construction of Hiwassee Dam and Reservoir (5 Fed. Reg. 4510) "in order to afford protection to the reservoir, to mitigate severance damages, and to reduce road relocation costs" (5 Fed. Reg. 4504); Presidential Proclamations approving transfer of lands in Polk County, Tennessee, and Fannin County, Georgia, from the Tennessee Valley Authority to the Forest Service, Department of Agriculture (5 Fed. Reg. 4515).

National Park Service to complete the Great Smoky Mountains National Park to its authorized boundaries and to construct the around-the-park highway contemplated in its master plan; but this benefit is purely incidental, and the condemnation would have been equally necessary if the Authority had been unable to make this disposition of the lands. The factors necessitating acquisition of the land were the difficulty of replacing the road and the impracticability of leaving the lands in private ownership without access. There is no warrant in the record for imputing any other purpose for the acquisition. Since the lands are being taken for an authorized public use, their subsequent transfer to the National Park Service is a matter as to which respondents have no standing to complain. *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698; *United States* v. *Forbes,* 259 Fed. 585 (M. D. Ala.), affirmed, 268 Fed. 273 (C. C. A. 5); *United States* v. *Meyer,* 113 F. 2d 387, certiorari denied, 311 U. S. 706.

Under the facts of this case, it seems clear that the taking was for a public use, irrespective of the question of relative expense of the various alternatives available to the Government, but it is submitted that this factor alone would support the Government's action in condemning the lands of the respondents. See *Old Dominion Land Co.* v. *United States,* 296 Fed. 20 (C. C. A. 4), affirmed, 269 U. S. 55. The alternative of con-

demning the interest of the State in the highway and the rights of access of the land-owners, would probably have cost in excess of two million dollars, or approximately double the cost of the alternative adopted.[14] To prevent the Government from giving weight to considerations of economic feasibility and financial good sense would add greatly to the cost of government projects. Since the

[14] The cost of relocating the road would have been approximately $1,400,000 (R. 21, 41). Under the decided cases, this would have been the measure of petitioner's liability to the State. *Town of Bedford* v. *United States*, 23 F. 2d 453 (C. C. A. 1); *United States* v. *Wheeler Township*, 66 F. 2d 977 (C. C. A. 8); *United States* v. *Town of Nahant*, 153 Fed. 520 (C. C. A. 1); *United States* v. *Alderson*, 53 F. Supp. 528 (S. D. W. Va.); *Jefferson County* v. *Tennessee Valley Authority*, 146 F. 2d 564 (C. C. A. 6), certiorari denied, 324 U. S. 871; *Mayor & City Council of Baltimore* v. *United States*, 147 F. 2d 786 (C. C. A. 4). This liability could not be avoided by acquiring the easements of access because the road was a through highway forming a link in the state highway system, although not generally used as such (R. 15, 52). By taking the easements of access appurtenant to their lands, petitioner also incurred a liability to the individual landowners measured by the depreciation in the value of their properties resulting from the taking. *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *cf. Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; see annotations, 49 A. L. R. 339 and 93 A. L. R. 639. The value of these properties was substantially destroyed, and petitioner's liability would therefore have been substantially the value of the fee (R. 58-61)—approximately $775,000 (R. 65). There is no merit to the suggestion of the court below that the solution adopted is uneconomical because it involves the construction by the Park Service of a more expensive road at some time in the future. The proposed road is part of the master plan

question of cost is always a vital consideration in determining whether or not to construct a project, particularly one intended to be wholly or partially self-supporting, the costs added by so narrow a view of the Government's powers of condemnation could prevent the construction of many projects which would otherwise be feasible.

III

The determination of the Authority's Board of Directors that the taking of respondents' lands was necessary for carrying out the statutory program of the Tennessee Valley was made in good faith, was not an abuse of discretion, and may not be set aside by a court

The decision of the Board of Directors of the Tennessee Valley Authority to enter into the contract of settlement with the State of North Carolina, Swain County, and the National Park Service (R. 99–113) was made after consideration of a report prepared by the Tennessee Valley Authority's staff which set forth the reasons for the proposed contract and recommended its approval (R. 14–16, 20-21, 59, 61–65).

The Board of Directors adopted identical resolutions in determining that the acquisition by the Tennessee Valley Authority of the fee in the lands of each of the respondents "is deemed by

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developed by the Park Service for the Great Smoky Mountains National Park (R. 64, 105–107) and presumably will have a value to the park at least equal to its cost. Since the lands acquired have a value to the Government as part of the park, this value should also be deducted from the total cost in weighing the over-all desirability of the settlement.

the Board to be necessary for the carrying out of the provisions and purposes of the Tennessee Valley Authority Act of 1933" (R. 61–62). The District Court found that:

> These determinations made by the Board of Directors of the Authority were made after the consideration of reports and recommendations presented to the Board by members of the Staff of the Authority, setting out the facts and circumstances surrounding the situation of the property involved, and *were made in good faith* [R. 14; 21; italics supplied].

In the face of the good-faith determinations by the Tennessee Valley Authority's Board of Directors that the taking of the fee in respondents' lands was necessary, the court below, while giving lip service to the rule that "ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts" (R. 129), proceeded to hold that "the only land which it was necessary for the TVA to take for the statutory project was the land covered by its reservoir" and that to condemn the lands, rather than easements of access appurtenant to them, "was excess condemnation, as they were not needed for any purpose authorized by the statute" (R. 130).

In so doing, the court ignored the rule so frequently announced by this Court that the determination as to the necessity for taking property

is a legislative question, not subject to judicial review. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66–67; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700; *Joslin Co.* v. *Providence*, 262 U. S. 668; *Bragg* v. *Weaver*, 251 U. S. 57; *Sears* v. *Akron*, 246 U. S. 242; *Shoemaker* v. *United States*, 147 U. S. 282; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668; *accord*, *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; *Barnidge* v. *United States*, 101 F. 2d 295 (C. C. A. 8); *Coggeshall* v. *United States*, 95 F. 2d 986 (C. C. A. 4); *United States* v. *Threlkeld*, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F. 2d 679 (C. C. A. 5).

The court below attempted to distinguish these cases on the ground that there is no constitutional power to take lands not actually flooded for reservoir purposes; that the lands are not, therefore, being taken for a public use; and that the determination of the Authority's Board of Directors is nugatory. That reservoir use is a public use is conceded, and that the lands are being taken for reservoir purposes we have already demonstrated (*supra*, pp. 25–35). Since the lands are being taken for a public use authorized by statute, the decision of the court below that the fee title is not necessary is an invasion of the legislative province. The extreme nature of the decision is apparent when we consider that the flooding of Highway No. 288 substantially destroyed the value

of respondents' lands and constituted a taking of at least the easements of access appurtenant to the lands.[15] The court therefore was substituting its judgment for that of the Authority's Board of Directors, not merely as to the lands needed for the project but as to the extent of the interest needed in lands in which, concededly, some interest must be acquired. Where some interest in the property must be taken, the extent of the interest to be acquired is certainly a matter within the discretion of the administrators to whom the duty of making the necessary determinations has been delegated by Congress.

The case of *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706, is in point. There, as here, lands not flooded were taken for a reservoir, and the landowners contended that a lesser interest than the fee was all that was required for the Government's purposes. In disposing of this contention, the court ruled that the determination of the Secretary of War that the taking of the fee was necessary was not subject to judicial review, stating that:

> Determination of the extent, amount or title of property to be taken, by an Administrative Department, is, in the absence of bad faith, final. [113 F. 2d at 392.]

There is no finding in the case at bar that the determination of the Authority's Board of Directors as to the necessity for taking the fee in respondents' lands constituted an abuse of discre-

[15] See *supra*, p. 33, n. 10.

tion, and there is no conceivable basis in the record on which such a finding could have been based. As pointed out above (pp. 28–29), the acquisition of the fee in the lands served by Highway No. 288 was the only practical solution of the problem created by the flooding of the highway. Far from being abused, the discretion delegated to the Authority was exercised with care and wisdom. The District Court repeatedly commended the manner in which it was exercised:

> I think you gentlemen acted with the very finest motives and my heart is absolutely with you * * * [R. 45].
>
> I think it's a fine plan, everything you did, and I thoroughly approve of it [R. 50].
>
> I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here [R. 55].

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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